EXHIBIT B

LEXSEE 1991 U.S. DIST. LEXIS 5255

IN RE: ASBESTOS SCHOOL LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

Master File No. 83-0268

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1991 U.S. Dist. LEXIS 5255

April 18, 1991, Decided
April 18, 1991, Filed

LexisNexis(R) Headnotes

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AKRON CITY SCHOOL DISTRICT BOARD OF EDUCATION BY: Donald A. Powell, Esq., David J. Hanna, Esq., Hamilton DeSaussure, Jr., Esq., Buckingham, Doolittle & Burroughs, Akron, Ohio.

UNION CARBIDE CORP. - BENJAMIN FOSTER CO., DIV. OF AMCHEM PRODUCTS BY: Seymour I. Toll, Esq., Teresa A. Wallace, Esq., Philadelphia, Pennsylvania.

COMBUSTION ENGINEERING, INC. BY: James J. Byrne, Jr., Esq., Media, Pennsylvania, William J. Winning, Esq.

WILKIN INSULATION CO. BY: Joseph T. Mallon, Esq., Media, Pennsylvania.

ROCK WOOL MANUFACTURING CO. BY: Jonathan Wheeler, Esq., Philadelphia, Pennsylvania.

BASIC, INC. BY: David J. Novack, Esq., Short Hills, New Jersey.

BUNKER HILL COMMUNITY SCHOOL DISTRICT NO. 8, BRUSSELS COMMUNITY UNIT SCHOOL [*21] DISTRICT NO. 42, CALHOUN COMMUNITY UNIT SCHOOL DISTRICT NO. 40, CARLINVILLE COMMUNITY UNIT SCHOOL DISTRICT NO. 1, CAROLLTON COMMUNITY UNIT SCHOOL DISTRICT NO. 1, GIRARD COMMUNITY UNIT SCHOOL DISTRICT NO. 3, GREENFIELD COMMUNITY UNIT SCHOOL DISTRICT NO. 10, JERSEY COMMUNITY UNIT SCHOOL DISTRICT NO. 100, LITCHFIELD COMMUNITY UNIT SCHOOL DISTRICT NO. 12, MT. OLIVE COMMUNITY UNIT SCHOOL DISTRICT NO. 5, NORTH GREENE COMMUNITY UNIT SCHOOL DISTRICT NO. 3, SOUTHWESTERN COMMUNITY UNIT SCHOOL DISTRICT NO. 9, STAUNTON COMMUNITY UNIT SCHOOL DISTRICT NO. 6, VIRDEN COMMUNITY UNIT SCHOOL DISTRICT NO. 4, CARLYLE COMMUNITY UNIT SCHOOL DISTRICT NO. 1, WESCLIN COMMUNITY UNIT SCHOOL DISTRICT NO. 3, BREESE ELEMENTARY SCHOOL DISTRICT NO. 12, ST. ROSE ELEMENTARY SCHOOL DISTRICT NO. 14-15, AVISTON ELEMENTARY SCHOOL DISTRICT NO. 21, WILLOW GROVE ELEMENTARY SCHOOL DISTRICT NO. 46, BARTELSO ELEMENTARY SCHOOL DISTRICT NO. 57, GERMANTOWN ELEMENTARY SCHOOL DISTRICT NO. 60, DAMIANSVILLE ELEMENTARY SCHOOL DISTRICT NO. 62, ALBERS ELEMENTARY SCHOOL DISTRICT NO. 63, CENTRAL COMMUNITY HIGH SCHOOL DISTRICT NO. 71, BREESE, IL, NORTH WAMAC SCHOOL DISTRICT NO. 186, CENTRALIA, IL, OAKDALE COMMUNITY CONSOLIDATED SCHOOL DISTRICT [*22] NO. 1, WEST WASHINGTON UNIT SCHOOL DISTRICT NO. 10, OKAWAVILLE, IL, IRVINGTON COMMUNITY UNIT CONSOLIDATED SCHOOL DISTRICT NO. 11, ASHLEY COMMUNITY UNIT CONSOLIDATED SCHOOL DISTRICT NO. 15, HOYLETON COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 29, NASHVILLE COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 49, NASHVILLE COMMUNITY CONSOLIDATED HIGH SCHOOL DISTRICT NO. 99, RACCOON CONSOLIDATED SCHOOL DISTRICT, KELL CONSOLIDATED SCHOOL DISTRICT, IUKA COMMUNITY CONSOLIDATED SCHOOL DISTRICT, SELMAVILLE COMMUNITY CONSOLIDATED SCHOOL DISTRICT, SALEM ELEMENTARY SCHOOL DISTRICT, ODIN GRADE SCHOOL, CENTRAL CITY SCHOOL, CENTRALIA, IL, CENTRALIA CITY SCHOOL, PATOKA COMMUNITY UNIT 100, KIMMUNDY-ALMA COMMUNITY UNIT SCHOOL DISTRICT, SANDOVAL COMMUNITY UNIT 501, CENTRALIA HIGH SCHOOL DISTRICT 200, SALEM HIGH SCHOOL DISTRICT NO. 600, ODIN COMMUNITY HIGH SCHOOL DISTRICT 700, PINCKNEYVILLE HIGH SCHOOL DISTRICT NO. 101, McCLELLEN COMMUNITY CONSOLIDATED DISTRICT NO. 12, WALTONVILLE COMMUNITY UNIT DISTRICT NO. 1, SUMMERSVILLE SCHOOL DISTRICT NO. 79, FIELD COMMUNITY CONSOLIDATED DISTRICT NO. 3, MT. VERNON DISTRICT NO. 80, OPDYKE-BELLE RIVE COMMUNITY CONSOLIDATED DISTRICT NO. 5, DODDS COMMUNITY CONSOLIDATED DISTRICT NO. 7, [*23] ROME COMMUNITY CONSOLIDATED DISTRICT NO. 2, WOODLAWN COMMUNITY CONSOLIDATED DISTRICT NO. 4, GRAND PRAIRIE COMMUNITY CONSOLIDATED DISTRICT NO. 6, INA COMMUNITY CONSOLIDATED DISTRICT NO. 8, FARRINGTON COMMUNITY CONSOLIDATED DISTRICT NO. 99, BLUFORD COMMUNITY CONSOLIDATED DISTRICT NO. 144, MT. VERNON TOWNSHIP HIGH SCHOOL DISTRICT NO. 201, WEBBER TOWNSHIP HIGH SCHOOL DISTRICT NO. 204, WOODLAWN COMMUNITY HIGH SCHOOL DISTRICT NO. 205, HAMILTON COUNTY UNIT DISTRICT NO. 10, BETHEL SCHOOL DISTRICT NO. 82, RED HILL SCHOOL DISTRICT, BY: G. Michael Taylor, Esq., - PRO HAC VICE, Stratton Dobbs, Mardull & Lestikow, Springfield, Illinois and Robert V. Shuff, Esq., - PRO HAC VICE, Pfeifer & Kelty, P.C., Springfield, Illinois.

DANA CORP. BY: Walter S. Jenkins, Esq., Philadelphia, Pennsylvania.

ARMSTRONG WORLD INDUSTRIES, INC. BY: Patrick R. Harkins, Esq., Edward J. Beder, Esq., Washington, D.C.

OWENS CORNING FIBERGLAS CORP. BY: John Patrick Kelley, Esq., Catherine N. Jasons, Esq., (Kelley, Jasons, McGuire & Spinelli) Philadelphia, Pennsylvania.

LAC D'AMIANTE DU QUEBEC, LTEE, PRO HAC VICE, - Frederick B. Lacey, Esq., Molly E. Boast, Esq., Jay G. Safer, Esq., LeBOEUF, LAMB, LEIBY & MacRAE, New York, **[*24]** New York.

KAISER CEMENT CORP., KAISER GYPSUM CO., INC. PRO HAC VICE, - Edwin O. Bailey, Esq., Randall D. White, Esq., Washington, D.C.

KEENE CORP. PRO HAC VICE, - Edward P. Abbot, Esq., Laura V. Jones, Esq., ANDERSON, KILL, OLICK & OSHINSKY, P.C., New York, New York.

BERNE-KNOX-WESTERLO CENTRAL SCHOOL DISTRICT BY: Paul A. Levine, Esq., COOPER, ERVING, SAVAGE, NOLAN & HELLER, Albany, New York.

W.R. GRACE & CO. - COHN. BY: John M. Elliott, Esq., Kevin J. Kehner, Esq., Elliot, Bray & Riley, Philadelphia, Pennsylvania.

GAF CORP., PRO HAC VICE - Cathi A. Hession, Esq., M. Bradford Stein, Esq., FLEMMING, ZULACK & WILLIAMSON, New York, New York.

THE SCHOOL DISTRICT OF SCOTTSBLUFF, IN THE COUNTY OF SCOTTS BLUFF, IN THE STATE Of NEBRASKA, BY: Joy Shiffermiller, Esq., ATKINS FERGUSON ZIMMERMAN CARNEY P.C. Scottsbluff, Nebraska.

AKRON CITY SCHOOL DISTRICT BOARD OF EDUCATION BY: Donald A. Powell, Esq., David J. Hanna, Esq., Hamilton DeSaussure, Jr., BUCKINGHAM, DOOLITTLE & BURROUGHS, Akron, Ohio, Theodore R Mann, Esq., MANN AND UNGAR, P.A., Philadelphia, Pennsylvania.

JUDGES:

James McGirr, Kelly, United States District Judge.

OPINIONBY:

KELLY

OPINION:

MEMORANDUM AND ORDER

Presently before the court are Plaintiffs' motions **[*25]** to reconsider Pretrial Orders Nos. 278, 285 and 286, which orders granted partial summary judgment to defendants Keene Corporation, Asbestospray Corporation, and Kaiser Gypsum Company, Inc., respectively, on certain non-conspiracy counts of the plaintiffs' class action complaints. Plaintiffs now request that those partial summary judgments be limited so as to be effective only against the named plaintiffs to which they apply, but not against any absent class members whom the named plaintiffs represent. Plaintiffs further request leave to search for a proper plaintiff to intervene in this action against each defendant on behalf of the class.

Plaintiffs assert that the absent class members have standing to present their claims and that the entry of summary judgment against those class members would spur multiple individual products liability actions which would not be barred by principles of res adjudicata. In addition Plaintiffs suggest that the defendants were put on notice by the original complaints in this action that substantial claims existed against them, albeit that the plaintiff class members were only identified generically at the time the actions which make up this class **[*26]** litigation were filed.

In response, the defendants argue that the schedule for intervention proposed by Plaintiffs, which schedule envisions a process at least three months in length for purposes of the possible intervention of a proper plaintiff, would improperly delay resolution of this complex matter. The defendants go so far as to suggest that this court should conclude that the named plaintiffs cannot adequately represent the class in any event, and that the class should be decertified sua sponte.

Neither party has hit the mark in attempting to characterize this matter. After more than eight years, the parties have finally filed pretrial memoranda, and have discussed the formation of a settlement committee as well as the appointment of a federal judge as mediator. Although several procedural issues remain pending before the Third Circuit and on petition for certiorari from the Supreme Court, it is hoped that trial can commence in the fall of this year.

At this juncture, I am not inclined to adopt the measures suggested by Plaintiffs because of the further delays they would impose on this case. In addition to the 102 days contained in Plaintiffs' proposed intervention schedule, **[*27]** the adoption of that proposal would entail a revisiting of discovery as to the new intervening

plaintiffs. which process would likely hinder the resolution of this matter in light of the fact that the product identification discovery deadline imposed by this court passed on March 15, 1990, n1 after having been extended several times previously. Plaintiffs argue otherwise, asserting that the bifurcation of trial into phases, the first of which would attempt to try predominant common issues, would allow any further needed discovery to take place without an interruption of the trial process. I do not share Plaintiffs' idealistic view, having been a witness to the long discovery period endured already in this matter.

n1 Pretrial Order No. 210.

Fed.R.Civ.P. 24(b) allows permissive intervention when (1) application is timely and (2) the parties have a common question of law or fact. Rule 24(b) also instructs that a court should consider whether such intervention would unduly delay or prejudice the adjudication of the rights **[*28]** of the original parties. The threshold determination of whether a motion is timely is a matter within the sound discretion of the trial court. See *NAACP v. New York, 413 U.S. at 365-66 (1973).* Although not dispositive of the question, the point to which a lawsuit has progressed is a determining factor as to the timeliness of the motion to intervene. Id.

While the resolution of this voluminous matter may not be imminent, this litigation has proceeded through the product identification discovery phase, through the expert discovery phase, and now has come to the onset of trial. At this critical stage in the litigation, significant interruptions or the retracing of steps already taken would hamper resolution of this matter. As pointed out by the defendants, several years of discovery have taken place, during which time Plaintiffs were amply provided opportunities to analyze the evidence they were collecting and request any adjustments seen as necessary to the most accurate representation of the class. What casts doubt on the timeliness of Plaintiffs' motions is not the sheer duration of time passed in this case, now more than eight years old, but the fact that **[*29]** Plaintiffs' have known from the outset of this case that the products liability theories set forth in the complaints depend upon evidence linking manufacturer to product to injured party. For Plaintiffs to suggest that only upon the entry of summary judgment on a products liability claim in favor of any one of the approximately 50 defendants to this action has it "[become] clear . . . that the interests of the unnamed class members would no longer be protected by the named class representative[,]" n2 ignores the extensive involvement of the parties in product identification discovery for much of the past eight years, and the reasonable perceptions and conclusions to be drawn from that process. It is noteworthy in this regard that in the course of the discovery process, Plaintiffs have even turned down opportunities offered by this court for approval of the use of settlement funds to conduct detailed building material analyses of plaintiff schools.

n2 See Plaintiffs' Memorandum of Law in Support of Motion to Reconsider Pretrial Order No. 285, p. 9, quoting *United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977).*

[*30]

In the class actions context, Rule 23(d) also permits intervention for purposes of improving or strengthening the representation of the class. See *Groves v. Insurance Co. of North America, 433 F.Supp. 877, 888-89 (E.D.Pa. 1977).* However where the interests of an absentee is identical to that of a nominal party, representation should be presumed adequate unless special circumstances are shown. See 7C WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE (2d), § 1909 (1986). The entry of summary judgment against the three defendants at issue here is not a "special circumstance" from which inadequacy of representation should be concluded. Having reached the summary judgment stage with respect to individual defendants in this multiple defendant class action, Plaintiffs should not be able to cite the court's adverse judgment as newfound notice that leave to investigate a possible reformation of the lineup of class representatives is suddenly necessary.

The Third Circuit case cited by Plaintiffs in support of the present motions, *Haas v. Pittsburgh National Bank, 526 F.2d 1083 (1975),* is distinct from the case at hand in that in Haas, the district **[*31]** court directed that another named plaintiff be added after a determination had been made approximately five months after class certification that the single named plaintiff who had brought suit on behalf of the plaintiff class could not represent the class against one of three defendants. In Haas, those class members who could not be represented by the original named plaintiff would otherwise have been shut out of the case and denied any relief subsequently awarded. Here, the plaintiff class has suffered an adverse summary judgment ruling with respect to the products liability claims against three of some 50 or more defendants. Conspiracy and concert of action counts remain with respect to these defendants.

I am aware of the difficulties in coordinating the representation of a nationwide constituency of school

districts, and that by their motions, Plaintiff do not now seek a granting of leave to intervene but only the opportunity to conduct a dialogue with the class membership in search of proper intervenors. However Plaintiffs have not made, nor do I believe they are likely to make upon further investigation, "a concrete showing of circumstances in [this] particular case that **[*32]** make the representation inadequate." See 7C WRIGHT AND MILLER, supra. Plaintiffs have fought tooth and nail in this court, as well as before the Third Circuit, and recently before the Supreme Court, to preserve this court's certification of the class, and with respect to numerous other related procedural challenges posed by the defendants. I do not believe Plaintiffs have made a sufficient showing that the class representation is faulty such that the requested leave to search for intervenors should be granted.

As trial in this matter approaches, the resources of the parties and this court will be refocused on the design of an appropriate trial format, emphasizing an efficient and economical means of resolving this complex matter through the long-awaited "day in court" for the parties before me. I recently requested and have begun to receive memoranda from the parties discussing the possible ordering of trial phases, in light of my desire to try the most predominant common issues first in hopes of most effectively guiding this case to resolution. I consider it to be of great assistance to this court that the parties have thus far been willing to respond my request with some altogether **[*33]** novel and creative suggestions, for we have entered perhaps the most challenging and most important stage of this litigation.

In light of those considerations, I conclude that Plaintiffs' motions should be denied. Consistent with the interests stated above, I also believe that the motions practice in this matter should be limited, at least temporarily, in view of my desire to focus the parties on the requisite joint effort with the court to devise a trial plan. Thus in addition to denying Plaintiffs' present motions, I will also hold in abeyance all motions currently before me which relate directly to the non-conspiracy counts set forth in the class complaints, and request that the parties refrain from filing additional motions relating directly to the non-conspiracy counts. No rights to file motions relating to the non-conspiracy counts will be deemed to have been forfeited as a result of compliance with my request, and the filing of motions relating to matters other than the non-conspiracy counts may continue in a timely fashion. An appropriate order follows.

Pretrial Order No. 306 - April 18, 1991, Filed

AND NOW, this 18th day of April, 1991, in consideration of Plaintiffs' **[*34]** Motions to Reconsider Pretrial Orders Nos. 278, 285 and 286, and Defendants' responses thereto, as well as Plaintiffs' reply, it is ORDERED that said motions are DENIED.

It is further ORDERED that all motions currently before this court relating directly to the non-conspiracy counts of Plaintiffs' class complaints be HELD IN ABEYANCE. The parties are requested to withhold the filing of additional motions relating directly to the non-conspiracy counts, but the filing of all other motions may continue in a timely fashion. No rights to file any motion will be deemed to have been forfeited as a result of the withholding of that motion in compliance with this court's request.